

# Public Health Emergency Law

CDC Foundational Course  
for Front-Line Practitioners  
Version 3.0

Developed by the  
Public Health Law Program  
U.S. Centers for Disease Control and Prevention



# Public Health Emergency Law: Course Overview

- Unit 1: Introduction to Emergency Management in the Federal System
- Unit 2: Emergency Powers: Protection of Persons
- Unit 3: Emergency Powers: Property and Volunteers



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Unit 3  
Emergency Powers:  
Property and Volunteers



# Disclaimer

These course materials are for instructional use only and are not intended as a substitute for professional legal or other advice. While every effort has been made to verify the accuracy of these materials, legal authorities and requirements may vary from jurisdiction to jurisdiction. Always seek the advice of an attorney or other qualified professional with any questions you may have regarding a legal matter.



# Unit 3 Objectives

*By the end of this unit, participants will understand basic legal principles applicable when government:*

1. Exercises emergency power over private property
2. Protects the public from dangerous or contaminated private property
3. Takes control of, uses, and allocates privately owned facilities, equipment, materials, and supplies
4. Recruits and manages emergency volunteers, and addresses liability concerns



# Objective 3.1

Understand basic legal principles  
applicable when government  
exercises emergency power over  
private property



# Property Issues Arise When:

- A building is the probable initial source of disease
- Livestock, food or drugs are (or are suspected to be) diseased or contaminated
- Shortages occur in medical equipment, drugs, vaccines
- Temporary facilities are needed to:
  - Accommodate a “surge” in patients
  - Provide housing for responders



# Range of Government Powers Over Property

- In appropriate situations, local, state, and federal agencies can:
  - Close / prohibit access to structures, land, and airspace
  - Confiscate and destroy property, including animals, birds, and crops
  - Commandeer and use facilities, equipment, and supplies
  - Regulate the use of property





# Range of Government Powers Over Property (cont.)

BUT:

- What specific *measures* are authorized?
  - For federal officials
  - For state/ local officials
- What legal *procedures* must be followed?
  - Due process
  - Special statutory procedures
- When must the government pay *compensation*?



# Types of Property Measures

- Access Control: to close, confiscate, deny access to, evacuate people from, or prevent the sale or use of real or personal property because it is dangerous, or because of a police investigation
- Government Use: to take or use private property in order to respond to an emergency

*The law treats “access control” and “use” differently*



# Source of Authority: Controlling Access to Property

- State police power:
  - General authority to take steps necessary to protect the public from unsafe conditions
  - Applies to closing, condemning, destroying, confiscating, and regulating (including licensing)
- Federal regulation:
  - Based on authority over interstate commerce
  - Power to impose conditions on spending for public welfare



# Constitutional Limits on Government Interference with Property Rights

- U.S. Constitution, 5th Amendment
  - Due Process Clause: “nor be deprived of life, liberty, or property, without due process of law”
  - Takings Clause: “...nor shall private property be taken for public use, without just compensation”
  - Made applicable to the States by 14<sup>th</sup> amendment
- Apply both during and absent a declared emergency



# Key Issue:

## When Must Government Pay the Property Owner?

### General Rule:



- Government need not pay owner when restricting public from access to or use of dangerous property (the property creates a public nuisance)

**BUT**

- Government must pay owner when using private property for a governmental purpose

*Caution: There are exceptions to general rule!*



# Objective 3.2

Understand basic legal principles applicable when government protects the public from dangerous or contaminated private property



# Closing Facilities and Impounding Property

- A state or local health department can (even in absence of emergency):
  - Issue an administrative public health order to close a facility or impound property
    - e.g., close restaurants for unsanitary conditions
  - Close a facility as a public nuisance
    - Same power is used to condemn a property as unsafe after fire, earthquake, storm damage



# Closing, Impounding, Destroying Property: Rights and Procedures

- In general, compensation is not provided to owner
  - Theory: owner is responsible for keeping own property safe; suffers risk of loss if it is not
  - But: there are statutory exceptions requiring compensation in some areas, and recent court decisions may expand compensable “takings”
- Owner can challenge action in court
  - Due process hearing after government takes possession
  - Damages could be awarded to property owner if the closing is shown to be unjustifiable





# Reopening a Facility Closed for Public Health Purposes

- Agency that issued the closure order:
  - Determines that facility no longer poses a threat to public health – it is “safe” or “acceptable”
  - Rescinds the closure order
- Other agencies may assert role
  - EPA may assist if threat arises from unsafe levels of toxins
  - Agency for Toxic Substances and Disease Registry
- Issue: Potential liability if reopened facility is unsafe?



# Use of Non-Emergency Powers in the Emergency Environment

- “Non-emergency” government powers may provide authority during an emergency to address:
  - Adulteration of foodstuffs
  - Safety of agricultural products
  - Drug safety
  - Agricultural control
  - Chemicals and toxic substances
  - Abatement of nuisances under common law
- Check for availability of emergency / expedited procedures:
  - Who can take action
  - What findings must support action
  - Ability to compress notice and comment periods



# Objective 3.3

Understand basic legal principles applicable when government takes control of, uses, and allocates privately owned facilities, equipment, materials, and supplies



# Emergency Use of Private Facilities: Legal Powers

- Both state and federal emergency laws empower government to seize and use property in an emergency
  - These powers permit government to act when negotiations for use of private property may not be possible
    - Historical example: army cavalry seizure of wagon train
  - Provide leverage in negotiations even where there IS time to negotiate



# Emergency Use of Health Care Facilities

## Georgia Example

- Some states have specific provisions covering use of health care facilities in emergencies:
  - Governor may “compel a health care facility to provide services or the use of its facility if such services or use are reasonable and necessary for emergency response.”
  - Use “may include transferring the management and supervision of the health care facility to the Department of Human Resources for a limited or unlimited period of time not extending beyond the termination of the public health emergency.”



# Emergency Use of Personal Property

## Georgia Example

- Georgia law also covers any materials required during an emergency
  - “The Governor may...(4) Commandeer or utilize any private property if he finds this necessary to cope with the emergency or disaster.”



# Property Measures:

## Emergency Seizure for Government Use

- Seizure should be considered a last resort:
  - What justifies “taking” property rather than simply contracting for use?
    - Proper planning for emergencies should identify the property which will need to be acquired
  - Power to “take” and use a facility does not include power to “take” and “direct” employees and management of a facility!



# Emergency Use of Private Facilities: Alternatives to Using Existing Facilities

- Explore temporary facilities available from NDMS, SNS, contractors or DoD
  - E.g., mobile field hospitals
- Explore temporary facilities with cooperating partners
  - From other states through mutual aid
  - Private-sector emergency contractors





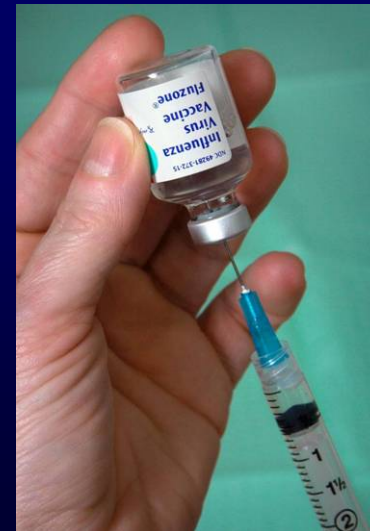
# Management of Private Property: Key Issues for Federal Powers

- Federal government also can take property in emergencies - subject to “due process” and “just compensation” [RARELY USED POWERS]
- Condemnation under Stafford Act Title VI:
  - Power to condemn; with right to take immediate possession
  - For purposes of preparedness, response, recovery
- Defense Production Act: “priority contracting”
  - Can apply to preparedness, response, recovery
  - Federal priority can be accorded to state or local acquisition contracts



# Emergency Reallocation of Resources: Federal Powers

- As a matter of policy, HHS frequently requests voluntary reallocation of private resources (vaccines, medications, ventilators) to protect public health
  - Voluntary re-routing of influenza vaccine in fall 2004
- HHS also can reallocate government-owned supplies:
  - Vaccines
  - Strategic National Stockpile



# Use of Un-Licensed Pharmaceuticals: Federal Powers

- Federal government has the power to authorize emergency uses of pharmaceuticals
  - FDA may approve a pharmaceutical for use as an “Emergency Use Investigational New Drug” (IND)
    - May be domestic drug awaiting approval
    - May be an imported pharmaceutical similar to a domestic pharmaceutical
    - Use requires informed, written consent of patient



# Federal Authorization for Emergency Use of Drugs

## Bioshield Act of 2004



- Used with emergencies involving biological / chemical / radiological agents
- HHS Secretary can authorize “emergency use” of unapproved drugs, devices, or biological products
  - After consultation with CDC and NIH
  - Requires determination of effectiveness and balancing of benefits and risks “to the extent feasible and appropriate given the circumstances”
  - Secretary can impose conditions on emergency use, including labeling and communication



# Emergency Waiver of Regulatory Restriction on Use of Property

- Compliance with federal regulations governing health care facilities may be impossible in emergency
  - Health care officials and facility operators should be aware of these restrictions
  - Health care facility operators can request waivers/suspension of requirements in emergency



# Emergency Waiver of Regulatory Restriction on Use of Property: EMTALA

- Emergency Medical Treatment and Active Labor Act (EMTALA) imposes two principal obligations on hospitals participating in Medicare – hospitals must:
  - Screen all individuals in ER to determine condition
  - Stabilize individuals before transferring or discharging
- Secretary of HHS can waive this requirement after declaring Public Health Emergency



# Objective 3.4

Understand basic legal issues applicable when government recruits and manages emergency volunteers, including liability, credentialing, and workers' compensation issues



# Accessing Volunteer Emergency Personnel

- Emergency Management Assistance Compact (EMAC)
- National Disaster Medical System (NDMS)
- Medical Reserve Corps (MRC)
- Emergency System for Advance Registration of Volunteer Health Professionals (ESAR-VHP)





# Legal Challenges and Issues Surrounding Volunteers

- Liability
- Credentials and Licensing
- Workers' Compensation



# Liability Issues During Emergencies

- Medical care and resources during emergencies will be provided to the best extent capable, but...

**ERRORS WILL OCCUR**

**MALPRACTICE WILL BE ALLEGED**

- State and federal laws provide protection from liability for acting in good faith during emergencies
- However, gaps remain in the liability protection offered to volunteer responders during emergencies



# Liability Protections under EMAC

- Officers and employees of the responding state are treated like agents of the requesting state for liability purposes
- No party state or its officers or employees are liable for negligence while rendering aid, although such persons ARE liable for willful misconduct, gross negligence, or recklessness



# Liability Protections under NDMS and MRC

- NDMS and other intermittent Federal employees generally have liability coverage under the Federal Tort Claims Act (FTCA) so long as they are acting within the scope of their Federal employment
- MRC members, if hired as intermittent Federal employees, will also have FTCA protection



# Liability Protections under ESAR-VHP

- Volunteers who register in their state ESAR-VHP database are generally NOT Federal employees and will generally NOT have Federal liability coverage
- HHS, however, MAY utilize certain emergency and temporary hiring authorities to hire some of these volunteers on a temporary basis



# Credentialing and Licensing under EMAC

- A “person” licensed in the responding state “shall be deemed” licensed in the requesting state UNLESS requesting governor orders otherwise



# Credentialing and Licensing under NDMS

- When activated, NDMS members, as intermittent Federal employees, will be treated as Federal employees for licensing and credentialing purposes
- When acting within the scope of their Federal employment, NDMS members who hold a state license do not need to be licensed in the state in which they are assigned to render aid
- Accepted standards for the credentialing of healthcare providers normally require primary source or secondary source verification



# Credentialing and Licensing under MRC and ESAR-VHP

- States have Federal funding to develop state ESAR-VHP systems, which are to include readily available, verifiable, and up-to-date information regarding the volunteer's identity and licensing, credentialing, accreditation, and privileging in medical facilities that need volunteers
- Federal law requires that all MRC members be listed in the interoperable network of state ESAR-VHP systems that the Secretary is required to maintain; registry in ESAR-VHP will facilitate verification of volunteers' licenses and credentials





# Workers' Compensation under EMAC, NDMS, MRC, and ESAR-VHP

- EMAC provides for workers' compensation protections for “state forces” deployed to respond to emergencies
- Federal employees, including NDMS members and possibly (e.g., if hired as Federal intermittent personnel) MRC members and volunteers registered in ESAR-VHP, generally have Federal Employees' Compensation Act (FECA) protection so long as they are acting within the scope of their Federal employment



# Minimizing Liability: Federal Volunteer Protection Act of 1997

- No liability for volunteer from any non-governmental organization (NGO) or government if:
  - Work performed within volunteer's scope of duties
  - Volunteer is properly licensed
  - Volunteer had no criminal or willful misconduct
- NGOs and governments can still remain independently liable for their own acts and actions of their volunteers



# Minimizing Liability: Recent Developments

- National Conference of Commissioners on Uniform State Laws has approved the “Uniform Emergency Volunteer Health Practitioners Act”
  - Adopted in several states to cover licensing and credentialing requirements
  - Includes liability “options” in two versions, with and without expanded liability protection
  - Tennessee enacted its version in June 2007 with liability protection and workers compensation coverage for emergency health care workers



# Minimizing Liability: Recent Developments

- Efforts also are underway to expand emergency volunteer liability protections beyond health care practitioners:
  - Since September 2001: 18 states have extended liability protection to architects & engineers assisting in emergency response and recovery efforts
  - In May 2007: Iowa enacted “entity liability protection” for businesses and non-profit organizations that provide good faith assistance under state direction during a public health disaster



# Minimizing Liability: Summary of Current Status

- Liability provisions and exposure vary by state
- Businesses and non-profit entities may face liability exposure, depending upon state law
- Liability exposure is low for volunteers acting in good faith and for government employees
- Risk of liability exists for persons (who are not government employees) receiving compensation
- These and related issues are under active consideration in many legislatures



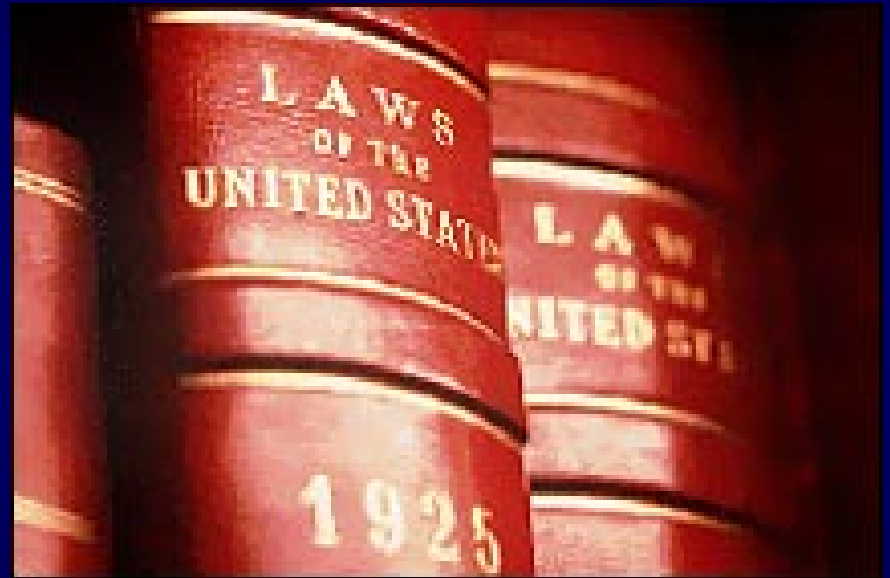
# Unit 3 Summary and Key Take-Aways

1. Each level of government has general powers to deny access to or take control of virtually any facility or property if necessary to protect the public's health
2. Government actions affecting private property are subject to “due process” procedural rights and, if government takes property for public use, to payment of compensation
3. Exercising statutory authorities over property in emergency requires pre-emergency planning, training, and advance contracting
4. Volunteers are a critical response resource, but advance planning is required to address logistics, licensing, credentialing, and liability concerns



# End: Unit 3

For additional information on public health law and legal preparedness visit the *CDC Public Health Law Program*



[www.cdc.gov/phlp](http://www.cdc.gov/phlp)

